NO. 83-6350

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

TIMOTHY WESLEY McCORQUODALE,

Petitioner,

v.

CHARLES BALKCOM, WARDEN AND
LEROY N. STYNCHCOMBE, SHERIFF,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS

MARY BETH WESTMORELAND
Assistant Attorney General
Counsel of Record for
Respondent Balkcom

H. ALLEN MOYE
Assistant District Attorney
Counsel of Record for
Respondent Stynchcombe

MICHAEL J. BOWERS
Attorney General

JAMES P. GOOGE, JR.
Executive Assistant
Attorney General

MARION O. GORDON
First Assistant
Attorney General

WILLIAM B. HILL, JR.
Senior Assistant
Attorney General

LEWIS R. SLATON
District Attorney

Please serve:

MARY BETH WESTMORELAND
132 State Judicial Bldg.
40 Capitol Square, S.W.
Atlanta, Georgia 30334
(404) 656-3349

QUESTIONS PRESENTED

1.

Did the Eleventh Circuit Court of Appeals properly follow the holdings of this Court in concluding that no potential juror was improperly excluded based on his or her opposition to the death penalty?

2.

Did the Eleventh Circuit correctly conclude that even a charge which is in violation of Sandstrom v. Montana, 442 U.S. 510 (1979) can be harmless error, particularly in light of the unusual circumstances of the instant case?

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PART ONE

STATEMENT OF THE CASE

Petitioner, Timothy Wesley McCorquodale, was indicted by a grand jury in Fulton County, Georgia for the murder of Donna Marie Dixon. Petitioner was subsequently tried before a jury in the Superior Court of Fulton County.

After the jury trial, a verdict of guilty was returned on the murder charge and the Petitioner was sentenced to death on April 12, 1974. On direct appeal, the Supreme Court of Georgia affirmed Petitioner's conviction and sentence and denied a petition for rehearing. McCorquodale v. State, 233 Ga. 369, 211 S.E.2d 577 (1974). A subsequent petition for a writ of certiorari and a petition for rehearing were denied by this Court. McCorquodale v. Georgia, 428 U.S. 910, rehearing denied, 429 U.S. 873 (1976).

On October 28, 1976, the Petitioner filed a petition for a writ of habeas corpus in the Superior Court of Fulton County.

That court denied relief on November 15, 1976. The Supreme Court of Georgia affirmed the denial of habeas corpus relief on May 12, 1977. McCorquodale v. Stynchcombe, 239 Ga. 138, 236 S.E.2d 486 (1977). A petition for a writ of certiorari and a petition for rehearing were denied by this Court. McCorquodale v. Stynchcombe, 434 U.S. 975 (1977), rehearing denied , 434 U.S. 1041 (1978).

Petitioner then filed an extraordinary motion for a new trial in the Superior Court of Fulton County. After an evidentiary hearing, that court denied relief on May 9, 1978. The Supreme Court of Georgia affirmed the denial on October 17, 1978. McCorquodale v. State, 242 Ga. 507, 249 S.E.2d 211 (1978).

A petition for habeas corpus relief was then filed in the United States District Court for the Northern District of Georgia on January 17, 1979. Extensive evidentiary hearings were conducted by the Magistrate who filed a report and recommendation on January 9, 1980, recommending that relief be denied. The district court subsequently denied relief and dismissed the petition on October 21, 1981. McCorquodale v. Balkcom, 525 F.Supp. 408 (N.D. Ga. 1981).

Petitioner appealed the denial of habeas corpus relief to the United States Court of Appeals for the Eleventh Circuit. After briefs were filed and oral argument was held, the panel of that court affirmed the district court's order in all respects except insofar as it pertained to alleged violations of Witherspoon v. Illinois, 391 U.S. 510 (1968). The panel directed that habeas corpus relief be granted as to the death sentence. McCorquodale v. Balkcom, 705 F.2d 1553 (11th Cir. 1983).

Respondent filed a petition for rehearing en banc which was granted by the court on June 30, 1983. Following additional briefing and oral argument, the en banc court affirmed the entire opinion by the district court and denied habeas corpus

relief as to the conviction and sentence. McCorquodale v. Balkcom, 721 F.2d 1493 (11th Cir. 1983)(en banc).

Petitioner has subsequently filed the instant petition for a writ of certiorari challenging the decision by the Eleventh Circuit Court of Appeals sitting en banc.

PART TWO

STATEMENT OF FACTS

Immediately prior to the beginning of the trial, Petitioner sought to enter a plea of guilty. (T. 32, 40, 96). The state opposed the entry of the plea based on a question as to whether the death penalty could be imposed based on the entry of a guilty plea under the Georgia statute. The trial judge decided that the Georgia statute would permit him to impose the death penalty, but rejected the plea because of his own specific conscientious objection to the death penalty. (T. 72-73). The court concluded that the Petitioner was deemed to "stand mute" which the court would consider as equivalent to a plea of not guilty. (T. 97-8).

A hearing was then held on Petitioner's motion to suppress his confession which was denied. Jury selection followed the hearing on the motion. Counsel for the Petitioner then began his opening statement to the jury, by stating, "Ladies and Gentlemen, we have been here trying to plead guilty for two days." (T. 468). Counsel later stated the following in his opening statement:

> Ladies and Gentlemen, we're guilty. We know it. It's that simple. And I think when you go throughout this trial and throughout this whole hearing you'll never hear any statement from us other than that. So that's the posture we are in today. We don't deny what the witnesses are going to say. I ask you to please even though here before you we say we're guilty, I ask you to please be attentive . . . I couldn't go into [the evidence] in detail [during voir dire], neither could Mr. England, but I tried to show you Ladies and Gentlemen, we are guilty.

(T. 468-9).

The Supreme Court of Georgia on direct appeal set forth a detailed statement of facts as they were presented at trial. That statement of facts is as follows:

> The state presented evidence to establish the following facts: On the evening of January 16, 1974, Donna, the victim, a 17-year-old girl, and her friend, Pamela Pharris, were in the area of Peachtree and 10th Street in the City of Atlanta known as "The Strip." While in a restaurant they were accosted by a man named Leroy who invited them to a bar for a beer. While in the bar the two girls engaged in a conversation with two black men. Leroy left the bar and the girls later went to another bar on "The Strip." Leroy met them at this bar, approached their table and accused Donna and Pamela of stealing $40 or $50 from him and giving the money to a black pimp. At this point they were joined by the defendant McCorquodale and his girlfriend, Bonnie Succaw (now Johnson). At the request of Leroy and McCorquodale the girls were taken to a bathroom and searched by Bonnie and a friend. They found no money. McCorquodale and Leroy then summoned a cab, and joined by Bonnie, they took Donna with them to Bonnie's apartment. They arrived at Bonnie's apartment shortly after midnight and found Bonnie's roommate, Linda, and Bonnie's three-year-old daughter asleep. The appellant McCorquodale had lived some eight months prior to this time in the

apartment with Bonnie. Linda joined them in the living room of Bonnie'a apartment and at this point there was some conversation between McCorquodale and Leroy about Donna being a "nigger lover" and that she needed to be taught a lesson.

The appellant, after telling Donna how pretty she was, raised his fist and hit her across the face. When she stood up, he grabbed her by her blouse, ripping it off. He then proceeded to remove her bra and tied her hands behind her back with a nylon stocking. McCorquodale then removed his belt, which was fastened with a rather large buckle, and repeatedly struck Donna across the back with the buckle end of the belt. He then took off all her clothing and then bound her mouth with tape and a washcloth. Leroy then kicked Donna and she fell to the floor. McCorquodale took his cigarette and burned the victim on the breasts, the thigh, and the navel. He then bit one of Donna's nipples and she began to bleed. He asked for a razor blade and then sliced the other nipple. He then called for a box of salt and poured it into the wounds he had made on her breasts. At this point Linda, who was eight months pregnant, became ill and went into the bedroom and closed the door. McCorquodale then lit a candle and proceeded to drip hot wax over Donna's body. He held the candle about 1/2 inch from Donna's vagina and dripped the hot wax into this part of her body. He then used a pair of

surgical scissors to cut around the victim's clitoris.

While bleeding from her nose and vagina, Leroy forced the victim to perform oral sex on him while McCorquodale had intercourse with her. Then Leroy had intercourse with the victim while McCorquodale forced his penis into the victim's mouth. McCorquodale then found a hard plastic bottle which was about 5 inches in height and placed an antiseptic solution within it, forcing this bottle into Donna's vagina and squirted the solution into her. The victim was then permitted to go to the bathroom to "get cleaned up." While she was in the bathroom, McCorquodale secured a piece of nylon rope and told Bonnie and her roommate that he was going "to kill the girl." He hid in a closet across the hall from the bathroom and when Donna came out of the bathroom he wrapped the nylon cord around her neck. Donna screamed, "My God, you're killing me." As McCorquodale tried to strangle her, the cord cut into his hands and Donna fell to the floor. He fell on top of her and began to strangle her with his bare hands. He removed his hands and the victim began to have convulsions. He again strangled her and then pulled her head up and forward to break her neck. He covered her lifeless body with a sheet and departed the apartment to search for a means of transporting her body from the scene. By this time, it was approximately 6:00 a.m. on the morning of January 17.

McCorquodale soon returned to the apartment and asked Bonnie for her trunk and Leroy and McCorquodale tried to place Donna's body in the trunk. Finding that the body was too large for the trunk McCorquodale proceeded to break Donna's arms and legs by holding them upright while he stomped on them with his foot. Donna's body was then placed in the trunk and the trunk was placed in the closet behind the curtains. McCorquodale and Leroy then went to sleep on the couch in the living room for the greater portion of the day, leaving the apartment sometime during the afternoon.

Because a strong odor began to emanate from the body, and her efforts to mask the smell with deodorant spray had been unsuccessful, Linda called Bonnie to request that McCorquodale remove the trunk from the apartment. Shortly after 8:00 p.m. McCorquodale arrived at the apartment with a person named Larry. As they attempted to move the trunk from the closet, blood began spilling from the trunk onto the living room floor. McCorquodale placed a towel under the trunk to absorb the blood as they carried the trunk to Larry's car. When McCorquodale and Larry returned to the apartment they told Linda that the body had been dumped out of the trunk into a road and that the trunk was placed under some boxes in a "Dempsey Dumpster." Donna's body was found about half a mile off Highway No. 42 in Clayton County.

McCorquodale v. State, 233 Ga. at 370-372. This Court has recognized that the "homicide was a horrifying torture-murder." Gregg v. Georgia, 428 U.S. 153, 201 (1976).

Defense counsel presented the following during his closing argument at trial:

> Yes, he killed her. The evidence points to that and the State says that. We're going to get into some of this later on . . . . Come right to the gut of it, he's guilty of the crime of murder. Maybe he's guilty and the Judge is going to charge you [sic] murder. Maybe he's guilty of manslaughter. The Judge is going to charge you that it has to be done with malice aforethought. You'll decide if it's malice or not. That's an issue I can't decide for you . . . . Try in your mind to ascertain what you believed happened out there and I think you'll find him guilty. Thank you.

(T. 700-702). Counsel excepted to the charge given based on a failure to include a charge on voluntary manslaughter, but the trial court declined to give such a charge.

The case then proceeded to a sentencing hearing before the same jury. Petitioner introduced evidence concerning the victim in an attempt to show that she was a transient teenager, masquerading as an adult. He also introduced evidence showing that he had been drunk during the torture-murder and also attempted to show that the victim did not appear to resist the acts of sex and torture. Petitioner also called a detective who testified that Petitioner appeared to be remorseful on the day after his confession. After arguments were made by both counsel and the jury was charged by the court, the jury voted to impose the death penalty.

PART THREE

REASONS FOR NOT GRANTING THE WRIT

I. THIS COURT SHOULD DECLINE TO GRANT CERTIORARI IN THE INSTANT CASE BECAUSE THE ELEVENTH CIRCUIT COURT OF APPEALS PROPERLY FOLLOWED THE DICTATES OF THIS COURT IN WITHERSPOON V. ILLINOIS, 391 U.S. 510 (1968) IN CONCLUDING THAT NO POTENTIAL JUROR WAS IMPROPERLY EXCLUDED BASED ON HIS OR HER OPPOSITION TO THE DEATH PENALTY.

Petitioner has suggested that this Court should grant certiorari to consider the decision by the en banc court of the United States Court of Appeals for the Eleventh Circuit as said opinion allegedly conflicts with this Court's decision in Witherspoon v. Illinois, supra. Petitioner asserts that the Eleventh Circuit's upholding of the excusal of potential jurors under the circumstances of this case extends the prior holdings of this Court because certain jurors were excluded after an en masse, nonverbal voir dire was conducted. Petitioner also challenges the decision by the Eleventh Circuit Court of Appeals to give deference to the trial court's findings in regard to the excusal of potential jurors.

At trial in the instant case, fifteen potential jurors were excused for cause after making affirmative responses to questions propounded by the assistant district attorney. These responses were made by standing and then steping forward. The district attorney asked the following questions:

> Ladies and Gentlemen, I want to address to you now, three questions and if your answer to the first question is, yes, will you please stand. If your answer to this question is no, will you please remain seated.

The question is this. Are you conscientiously opposed to capital punishment? If you are conscientiously opposed to capital punishment, if you will, please stand. If you are not conscientiously opposed to capital punishment, remain seated.

All right, now all the jurors who are conscientiously opposed to capital punishment, please stand. Now Ladies and Gentlemen, those of you who are standing, those who are standing and have indicated by doing so that you are conscientiously opposed to capital punishment, I would like to address to you two additional questions. If your answer to any of these questions is, yes, I'd like to, if you would, please simply step up to the rostrum.

If your answer is no to both questions, then please remain where you are. The first question is this. Would you allow your opinion about capital punishment to prevent you from voting for the death penalty in this case, regardless of what the evidence was?

* * *

If your answer is yes to the question, please step forward to the rostrum . . . . This is addressed to every juror who has not come forward but who has indicated by

> standing, that you are conscientiously opposed to capital punishment.
>
> The question is this. Would you allow your opinion about capital punishment to prevent you from being a fair and impartial juror on the issue of guilt or innocence as distinguished from the issue of punishment? If you would, would you please step forward.

(T. 278-81). Those venirepersons who affirmatively responded to the second or third question were then excused for cause. Defense counsel objected to their being excused, asserting that the first question was improper and then objecting generally at the time all fifteen were excluded. No specific objections were made to any particular juror and defense counsel did not request that any particular venireperson be questioned individually.

Later during the voir dire examination, venireman Allen Kidd was excused for cause. Mr. Kidd had not initially responded to the prior questions, but he commented during the voir dire examination that he believed in capital punishment "to a certain extent." (T. 403). The following then transpired:

> THE COURT: You say you never could vote for it regardless of the circumstances?
>
> THE JUROR: No, sir.
>
> THE COURT: Did you hear the question that was posed to you just awhile ago? Did you understand the question?
>
> THE JUROR: No. I did not understand.

THE COURT: You could not under any circumstances vote for the death penalty?

THE JUROR: No.

THE COURT: Is that right, under any circumstances?

THE JUROR: No.

(T. 403).

Lastly, potential juror Woodlief was excused for cause after the following voir dire examination:

Q. Do you really believe in capital punishment?

A. No.

Q. You don't?

A. No I don't. It's different being faced, you know, discussing capital punishment and sending someone to the electric chair.

THE COURT: You didn't understand the question that was posed to you awhile ago?

THE JUROR: Yes, I did at that time. I thought that under certain situations and possibly to rationalize this to myself, but sitting here and observing, I don't think I could do it, I really don't.

(T. 401).

Three different questions are presented concerning the excusal of the potential jurors for cause. Petitioner challenges the excusal of the first fifteen venirepersons based on the en masse and nonverbal nature of the voir dire examination. Petitioner also challenges, in regard to all jurors excused, the statement by the Eleventh Circuit Court of Appeals that it would give deference to the trial judge's assessment of the potential jurors. Respondent asserts that all conclusions by the Eleventh Circuit Court of Appeals comply with the prior holdings of this Court and do not serve as the basis for the granting of a writ of certiorari.

Respondent recognizes that this Court has never specifically addressed the question of whether Witherspoon requires individual questioning of prospective jurors or whether the responses given by potential jurors must specifically be verbal. Respondent submits, however, that this Court has never set forth such a requirement and the mere fact that the Eleventh Circuit Court of Appeals upheld such a procedure does not extend the principles of Witherspoon v. Illinois.

In Witherspoon v. Illinois, supra, this Court stated:

> [N]othing we say today bears upon the power of a State to execute a defendant sentenced to death by a jury from which the only veniremen who were in fact excluded for cause were those who made unmistakably clear (1) that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt.

Id. at 522 n. 21 (emphasis added and some emphasis in original). Respondent submits that the voir dire utilized in the instant case to exclude the fifteen jurors clearly complies with the above standards. The record supports the finding that each and every potential juror made it unmistakably clear that his or her views would prevent an impartial decision as to guilt or would prevent the potential juror from imposing the death penalty.

Petitioner has yet to cite a case in which individual voir dire or verbal responses are required in the context of Witherspoon questions. Respondent submits that the Eleventh Circuit properly focused the inquiry on the form and substance of the questions and the responses given. "Verbal responses however are not talismans for clarity. They are often fraught with ambiguity. Much turns on the tone of voice, the facial expressions and the demeanor of the venireperson as the response is delivered." McCorquodale v. Balkcom, 705 F.2d at 1561 (Kravitch, J., dissenting). In evaluating the particular responses in question, the Eleventh Circuit concluded that the question necessarily involved what degree of deference was to be granted to a trial court's assessment of the responses made by the juror.

The Eleventh Circuit Court of Appeals concluded the following:

> We hold that group questioning and non-verbal responses do not constitute a per se violation of Witherspoon. Witherspoon governs substance of the inquiry to be made, not its form and only requires that the voir dire method used for questioning and receiving responses allows a court to determine in the particular case at hand that the excluded venirepersons "made unmistakably clear" that their attitude

> toward the death penalty would either automatically cause them to vote against the death penalty or prevent them from impartially deciding the defendant's guilt.
>
> In this case, posing the Witherspoon questions to the jury pool as a group did not prevent the trial court from making this necessary determination. The questions asked by the prosecution went immediately to the relevant Witherspoon inquiries and carefully tracked the wording of Witherspoon. (footnote omitted). Furthermore, the responses to be made by those venirepersons responding affirmatively to the questions -- standing up in answer to the first question and stepping forward as to the next two questions -- were clearly stated to the jurors and were not susceptible to misunderstanding.

McCorquodale v. Balkcom, 721 F.2d 1496-1497 (emphasis in original).

In examining the record in the instant case, it is clear that no venireperson was prevented from indicating he or she did not understand the questions or from asking for clarification. The trial court also did not prevent defense counsel or the prosecution from asking individual questions concerning this topic. Defense counsel made only general objections without specifying the nature of the objection or directing any objection to any particular juror. Furthermore, the questions that were asked were clearly worded such as to invoke an affirmative response only from jurors whose beliefs were unequivocating. Thus, only those jurors who could answer the questions without hesitation would stand or step forward in response.

Respondent submits that the mere fact that the voir dire in question took place in a collective manner and that the answers were non-verbal is insufficient to justify the granting of certiorari in the instant case. This does not impermissibly extend the holding in Witherspoon v. Illinois as the questions were phrased appropriately under that decision and the responses provided for were unambiguous.

A further question presented by the Petitioner concerns the granting of deference to the trial court's consideration of the demeanor and clarity of the responses. The Eleventh Circuit Court of Appeals considered that it was appropriate to give some deference to the trial court's assessment because "[w]hether verbal or non-verbal, a response once reduced to a written record may not adequately convey the strength of the juror's response." McCorquodale v. Balkcom, 721 F.2d at 1498. Thus, the Eleventh Circuit Court of Appeals concluded "Witherspoon requires a reviewing court to independently review the record to ensure that the exclusions were proper, but that review must take into account that the trial judge was in a much better position to evaluate the clarity of a juror's response." Id. In all instances, Respondent would assert that it is important to give some manner of deference to the trial court's conclusions concerning the responses of potential jurors and the ascertainment by the trial court of whether those responses fell within the guidelines established by Witherspoon. See Irvin v. Dowd, 366 U.S. 717, 723-24 (1961)(finding of strength of prospective jurors' opinion based on publicity by the trial court should not be set aside unless error is manifest); United States v. Robbins, 500 F.2d 650, 653 (5th Cir. 1974)(rulings made on suggestions of impartiality are within the discretion of the trial court and an abuse of discretion must be made clear in order to warrant reversal). The mere granting of deference to a trial court's assessment of the demeanor of a juror does not impermissibly extend the holding of Witherspoon as it merely recognizes the principle

which is utilized in reviewing numerous other issues about which the trial court is more likely to have relevant information.

Recently, this Court considered an inquiry into juror partiality. In that context, this Court held:

> The substance of the ex parte communications and their effect on juror impartiality are questions of historical fact entitled to this presumpiton [of correctness]. Thus, they must be determined, in the first instance, by state courts and deferred to, in the absence of "convincing evidence" to the contrary, by the federal courts. See Marshall v. Lonberger, ___ U.S. ___, ___, 103 S.Ct. 843, 850, 74 L.Ed.2d 646 (1983). Here, both the state's trial and appellate courts concluded that the jury's deliberations, as a whole, were not biased. This finding of "fact" -- on a question the state courts were in a far better position than the federal courts to answer -- deserves a "high meausre of deference."

Rushen v. Spain, ___ U.S. ___, 104 S.Ct. 453, 456 (1983). Respondent submits that this reasoning should be applied to the instant case. The excusal of the veniremen was clearly an implied "factual finding," that the potential jurors' responses were unambiguous. According deference to this finding falls squarely within the parameters of this Court's prior holding.

Respondent submits that the focus of the inquiry should not be on the nature of the voir dire conducted but on the substance of the questions and the responses given. In construing the responses given by any juror, it is absolutely necessary to accord some degree of deference to the trial court's assessment of those responses. Implicit in the record

in the case is a conclusion by the trial court that the jurors responded unambiguously to the questions asked. No suggestion has been made by the Petitioner that any juror made an ambiguous response or hesitated in any manner in making a response to any question asked during the collective voir dire examination. Therefore, absent some reason for a finding to the contrary, Respondent would assert that those jurors were properly excluded under this Court's holding in Witherspoon v. Illinois.

Petitioner also challenges the Eleventh Circuit Court of Appeals granting deference to the trial court's judgment in relation to potential juror Sylvia Woodlief. In analyzing the responses given by Ms. Woodlief, the Eleventh Circuit Court of Appeals en banc concluded that the use of the word "think" was overemphasized. The court concluded that placing the word within the context of the entire voir dire, the response given by the juror was unambiguous and unequivocal. This was particularly true in light of the fact that the juror obviously contemplated the prior question being asked and after thinking for some time upon the questions specifically came to her own conclusion that she could not impose the death penalty. The court merely mentioned the fact that the trial court was able to observe Ms. Woodlief's demeanor in this regard. It does not appear that the Eleventh Circuit Court of Appeals specifically relied upon the trial court's judgment, but found from the record that Ms. Woodlief's responses were unambiguous. Thus, Respondent submits that it is clear that Ms. Woodlief was properly excluded and that there was no need to consider whether to give deference to the trial court's conclusions with regard to this particular juror.

In summary, Respondent submits that the Eleventh Circuit has followed the directives previously set forth by this Court. No evidence has been submitted and there is no indication in the record that the jurors who responded to the questions during the collective voir dire misunderstood any of

the questions propounded. Based on the record, there is no need to speculate that some jurors might have misunderstood these questions. The only juror who indicated some misunderstanding was Juror Kidd who, because of his misunderstanding, specifically did not respond affirmatively to the questions. Respondent submits that the record shows that in order to make an affirmative response to the questions, jurors would have to understand the questions. Thus, the fifteen jurors who responded obviously did understand the questions that were asked. The holding by the Eleventh Circuit Court of Appeals does not create any new standard for the review of Witherspoon exclusions. The court granted deference to a trial court's assessment in a situation in which it was clearly appropriate. This does not create a new imperative with regard to federal review of Witherspoon questions, but merely supplements this Court's conclusions. At no time did the Eleventh Circuit Court of Appeals deviate from this Court's requirement of finding "unmistakable clarity." The decision by the Eleventh Circuit Court of Appeals complies with the stringent standard previously set forth. Clearly, the mere granting of deference to a trial court's assessment of the demeanor of a juror is insufficient to justify the granting of a writ of certiorari because it does not establish a substantial question of federal law and does not extend this Court's holdings in Witherspoon v. Illinois. Therefore, no reason exists for the granting of certiorari on this issue.

II. THE ELEVENTH CIRCUIT COURT OF APPEALS PROPERLY CONCLUDED THAT ANY ERROR IN THE CHARGE WAS HARMLESS BEYOND A REASONABLE DOUBT IN LIGHT OF THE FACTS OF THE INSTANT CASE.

Petitioner challenged the jury instructions given, asserting that such were violative of Sandstrom v. Montana, 442 U.S. 510 (1979). Petitioner now specifically raises the application of the harmless error rule by the Eleventh Circuit Court of Appeals in the instant case.

The trial court charged the jury as follows:

> Now Ladies and Gentlemen, the defendant enters upon the trial of this case with the presumption of innocence in his favor and that presumption remains with him throughout the trial of the case until and unless the State produces evidence in your presence and hearing sufficient to satisfy your minds beyond a reasonable doubt of the defendant's guilt of the offense as charged in the bill of indictment. It is necessary for the State to prove every material allegation of the bill of indictment to your satisfaction and beyond a reasonable doubt by the production of evidence before you will be authorized to find the defendant guilty,

(T. 704). The court then went on to charge on the definition of reasonable doubt. The court charged on circumstantial evidence stating, "the proved facts shall not only be consistent with the hypothesis of guilt, but shall exclude every other reasonable hypothesis save that of the guilt of the accused." (T. 707).

The court later defined murder and malice, both express and implied. The court then gave the charge which has been challenged in the instant proceeding, which is as follows:

> The law presumes that a person intends to accomplish the natural and probable consequences of his acts and if a person uses a deadly weapon and instrumentality in the manner in which such weapon or instrumentality is ordinarily employed to produce death and thereby causes the death of a human being, the law presumes the intent to kill. This presumption may be rebutted. I further instruct you, a person will not be presumed to act with criminal intention, but the trier of facts may find such intention upon consideration of the words, conduct, demeanor, motive and all other circumstances connected with the act for which the accused is prosecuted.

(T. 709).

In the instant case, the district court found that the charge in question was burden-shifting in violation of Sandstrom v. Montana, supra but concluded that any such error was harmless beyond a reasonable doubt. The district court concluded that the trial strategy utilized by the Petitioner "negated the materiality of intent as an issue.". McCorquodale v. Balkcom, 525 F.Supp. at 417. The court based this finding on the statements by counsel as to guilt along with a review of the entire transcript which the court concluded indicated no conduct on the part of Petitioner or counsel inconsistent with the admission of guilt and also based on a finding that there was an abundance of evidence to support the finding of intent. Id.

The panel of the Eleventh Circuit Court of Appeals examined the charge as well and found, "under the peculiar circumstances of this case, we find that the defendant's insistent assertions of guilt effectively withdrew the issue of intent from the jury." McCorquodale v. Balkcom, 705 F.2d at 1556. The en banc court did not address this issue.

Initially, Respondent would submit that the language in the instant case is clearly distinguishable from that found unconstitutional in Sandstrom v. Montana. In that case the jury was not told that the presumption could be rebutted, even by the presentation of any evidence by the defendant. Id. at 517. Furthermore, the compelling language found in a similar charge by the Fifth Circuit Court of Appeals in Tyler v. Phelps, 643 F.2d 1095 (5th Cir. 1981) that "unless and until the presumption is so outweighed, the jury is bound to find in accordance with the presumption," was not present in the instant case. Id. at 1099.

Respondent submits that the charge in the instant case clearly contained curative language which was not present in Sandstrom v. Montana. Under the charge given in the instant case, the jury clearly was free to weigh all evidence presented. Respondent submits that in applying the test set forth by this Court, that is, that "the device must not undermine the factfinder's responsibility at trial, based on the evidence adduced by the state, to find the ultimate facts beyond a reasonable doubt," the instructions in the instant case were not impermissibly burden-shifting. County Court of Ulster v. Allen, 442 U.S. 140, 156 (1979); See Skrine v. State, 244 Ga. 520 260 S.E.2d 900 (1979). Thus, Respondent submits that the charge in question was not violative of the holdings of Sandstrom v. Montana; therefore, it is not necessary to reach the harmless error question in this case.

It is also important to note in the instant case that the portion of the charge challenged concerns the language relating to the use of a deadly weapon or instrumentality. The jury

could hardly have relied on that charge in the instant case as the death was not caused by the use of a deadly weapon or instrumentality. The Petitioner attempted to strangle the victim with a nylon cord. Once the cord cut into his hands, the Petitioner released the victim. The following then transpired:

> He fell on top of her and began to strangle her with his bare hands. He removed his hands and the victim began to have convulsions. He again strangled her and then pulled her head up and forward to break her neck.

McCorquodale v. State, supra, 233 Ga. at 371. Thus, as no deadly weapon or instrumentality was the cause of death, the charge relating to intent in this case was simply inapplicable. Therefore, there is no need to reach the question of whether the charge was burden-shifting or whether it amounted to harmless error in this case.

Finally, Respondent asserts that even if this Court concludes that the charge was applicable and was impermissibly burden-shifting, it was at most harmless error. This Court addressed the question of harmless error in Connecticut v. Johnson, ___U.S.___, 103 S.Ct. 969 (1983). The plurality opinion determined that it was left to the lower courts to determine whether "by raising a particular defense or by his other actions, a defendant himself has taken the issue of intent away from the jury." Id. 103 S.Ct. at 978. As noted by the panel opinion and the district court in this case, under the particular circumstances of this case, the insistent assertions of guilt from the Petitioner effectively withdrew the issue of intent from the jury, thereby rendering any violation of Sandstrom v. Montana harmless beyond a reasonable doubt.

During the opening statement presented by defense counsel, counsel stated to the jury, "We've been here trying to plead guilty for two days." (T. 468). Counsel went on to state, "We are guilty. We know it. It's that simple. And I think when you go thoughout this trial and throughout this whole hearing you'll never hear any statement from us other than that." (T. 469). In closing argument, defense counsel stated, "Yes, he killed her." (T. 700). Defense counsel also stated, "He's guilty of the crime of murder." (T. 702). In concluding his argument, counsel stated, "Try in your mind to ascertain what you believe happened out there and I think you will find him guilty." Id. Thus, it is clear that the strategy employed by counsel in the case was to admit guilt from the beginning of the trial, as there was no possible defense that counsel could employ, and to hope that the jury would not impose a death sentence.

The district court considered this allegation and found that the strategy employed by Petitioner "more radically relieved the State of its burden of persuasion and did the court's charge on the rebuttable presumption of intent." McCorquodale v. Balkcom, 525 F.Supp. at 416. The court went on to hold the following:

> Knowing that the State's evidence was overwhelming and highly inflammatory, and taking into account the fact that the trial jury would also be the sentencing jury -- Petitioner made a decision to admit guilt, and garner whatever sympathy could thereby be obtained. In his opening statement and his closing argument, Petitioner's counsel stated to the jury that his client was guilty. At one point in the closing argument, he stated that his client was "guilty of the crime of murder" although at

> a subsequent point the suggestion was made "maybe he's guilty of manslaughter." Viewing defense counsel's remarks most favorably to Petitioner, defense counsel was still inviting the jury to find his client guilty of voluntary manslaughter, which in Georgia includes the element of intent (though not malice aforethought) just as does first-degree murder. (Footnote omitted). Given Petitioner's admission, and the fact that neither counsel's argument, statements to the court nor any questions to any of the witnesses even remotely hint that Petitioner considered intent to be disputed, the court finds that Petitioner's conduct so effectively aided the State in meeting its burden of persuasion on the issue of intent that he cannot now be heard to complain of the mildly burden-shifting effect of the charge involved here.

Id. Furthermore, it should be noted that voluntary manslaughter was not charged to the jury in the instant case; therefore, that was simply not a question for the jury to resolve.

The panel decision by the Eleventh Circuit Court of Appeals held as did the district court, that is, "We find that the defendant's insistent assertions of guilt effectively withdrew the issue of intent from the jury." McCorquodale v. Balkcom, 705 F.2d at 1556. Thus, that court also concluded that any burden-shifting effect the charge might have had was harmless beyond a reasonable doubt.

Respondent submits that this case is clearly an appropriate one for an application of the harmless error principle as

Petitioner himself removed the question of intent from the jury by numerous admissions of guilt during opening statements, closing arguments and the trial itself. Under these unusual facts, Respondent asserts that the harmless error rule should apply. Thus, Respondent urges this Court to conclude that this allegation does not present a federal constitutional question for review by this Court.

CONCLUSION

For all of the above and foregoing reasons, Respondent respectfully requests that this Court deny the petition for a writ of certiorari filed on behalf of Petitioner, Timothy Wesley McCorquodale.

Respectfully submitted,

MICHAEL J. BOWERS
Attorney General

JAMES P. GOOGE, JR.
Executive Assistant Attorney General

Marion O. Gordon
MARION O. GORDON
First Assistant Attorney General

Julian B. Hill
WILLIAM B. HILL, JR.
Senior Assistant Attorney General

Mary Beth Westmoreland
MARY BETH WESTMORELAND
Assistant Attorney General

LEWIS R. SLATON
District Attorney

H. Allen Moye
H. ALLEN MOYE
Assistant District Attorney

MARY BETH WESTMORELAND
132 State Judicial Building
40 Capitol Square, S. W.
Atlanta, Georgia 30334
(404) 656-3349

CERTIFICATE OF SERVICE

I, MARY BETH WESTMORELAND, a member of the Bar of the Supreme Court of the United States and Counsel of Record for Respondent Balkcom, hereby certify that in accordance with the Rules of the Supreme Court of the United States, I have this day served a true and correct copy of this Brief in Opposition for the Respondent upon the Petitioner by depositing copies of same in the United States mail with proper address and adequate postage to:

John R. Myer
1515 Healey Building
57 Forsyth Street
Atlanta, Georgia 30303

John Charles Boger
99 Hudson Street
New York, New York 10013

Anthony G. Amsterdam
New York University School of Law
40 Washington Square South
New York, New York 10012

This 2nd day of April, 1984.

Mary Beth Westmoreland
MARY BETH WESTMORELAND
Assistant Attorney General